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No. 676

In the Supreme Court of the United States

OCTOBER TERM, 1970

JAMES DUDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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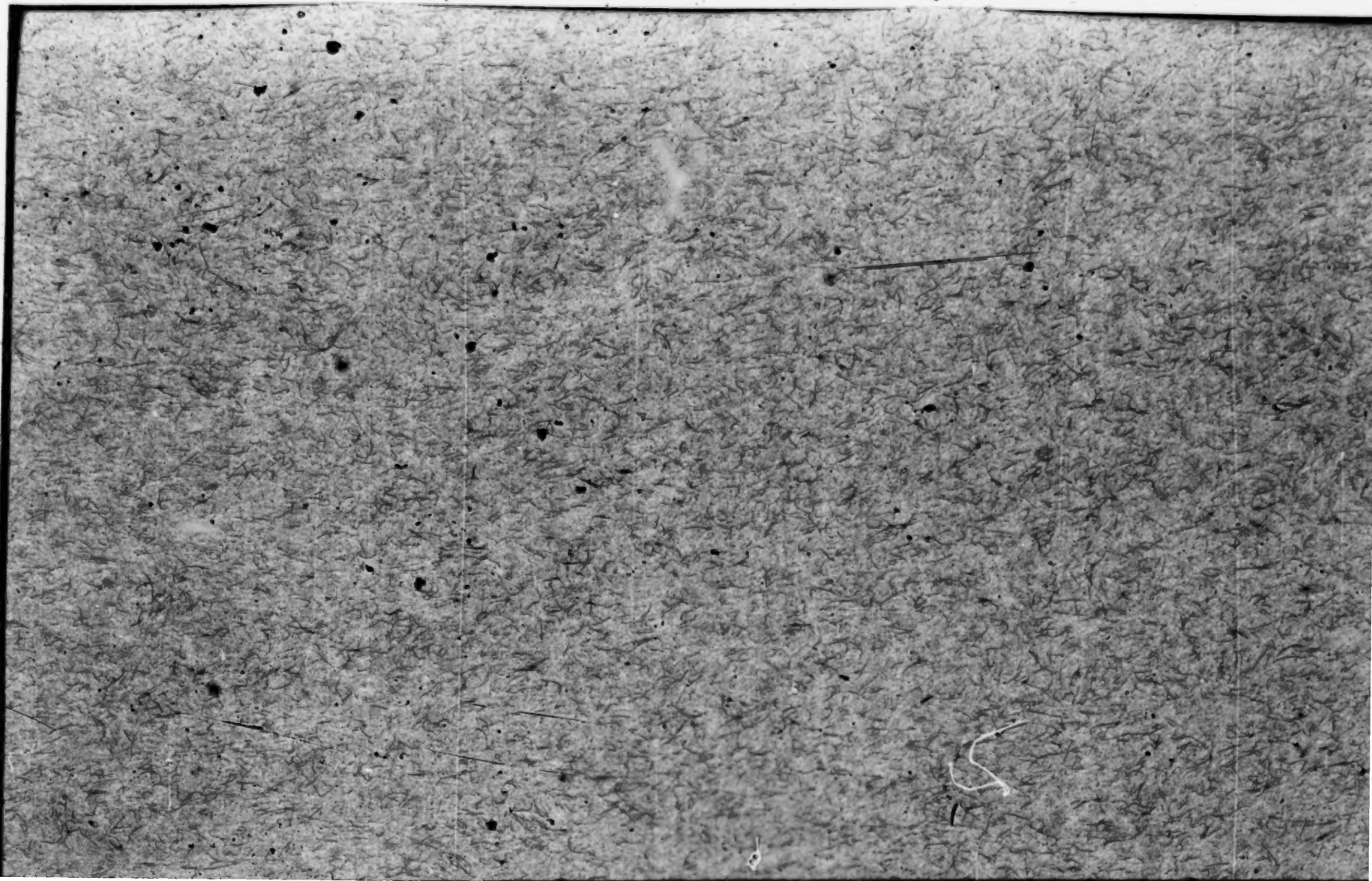

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A2) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3) was entered on July 17, 1970. A petition for rehearing was denied on August 11, 1970. The petition for a writ of certiorari was filed on September 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

406-444—70

QUESTION PRESENTED

Whether the court committed plain error in omitting from its charge an instruction requiring the jury to determine the value of stolen government property, where the stolen property was clearly worth more than $100 and petitioner made no request for such an instruction.

STATEMENT

Petitioner was convicted after trial by jury in the Northern District of Alabama, of receiving and concealing stolen government property of a value in excess of one hundred dollars (approximately five hundred blank postal money orders and a postal money order issuing machine) in violation of 18 U.S.C. 641. He was sentenced to three years' imprisonment. The statute limits the penalty to one year's imprisonment and a $1,000 fine if the value of the stolen property is not in excess of one hundred dollars; otherwise a penalty of up to ten years' imprisonment and a fine of up to $10,000 may be imposed.

There was evidence that the machine itself had a value of $55.00 (A. 190);[1] that each of the blank money orders could be issued by the machine for a value of up to $100 (A. 190–191); and that, in petitioner's presence, the machine had been tested and three money orders had been "made" correctly (A. 255), one for $95 (A. 115) and the others for an unspecified amount.[2] Petitioner raised no issue at

[1] "A." refers to the appendix in the court of appeals, a copy of which is being lodged with this brief.

[2] After being "made" correctly, the three money orders were destroyed (A. 255).

trial concerning the value of the stolen property. His sole defense was that he neither participated in the theft of the machine and money orders nor had any knowledge that the stolen property was in a back room of the house next door until his arrest. Both petitioner and his wife took the stand to deny conflicting testimony of government witnesses (A. 265–269, 279–287).

Petitioner requested no instruction concerning value. He objected only to that part of the court's charge which embodied the "possession of recently stolen property" inference (A. 308–309, 326).

ARGUMENT

Contrary to petitioner's assertion (Pet. 5), this is not a case where the evidence concerning an essential element of the offense "was not strong." Compare *Barry* v. *United States*, 287 F. 2d 340, 342 (C.A.D.C.). The value of blank money orders, when stolen, is not determined by "the nominal value of pieces of paper," but rather by "the amount the goods may bring to the thief." *Churder* v. *United States*, 387 F. 2d 825, 833 (C.A. 8). Here, each of the money orders could have been validated for up to $100, and petitioner and his cohorts possessed a stolen machine to validate them. The total value of the stolen property was thus well in excess of $100. *Montgomery* v. *United States*, 403 F. 2d 605, 610 (C.A. 8), certiorari denied, 396 U.S. 859; *Jalbert* v. *United States*, 375 F. 2d 125, 126 (C.A. 5), certiorari denied, 389 U.S. 899; see also *United States* v. *Ciongoli*, 358 F. 2d 439, 441 (C.A. 3); *United States* v. *Kramer*, 289 F. 2d 909,

921 (C.A. 2). In these circumstances, it was entirely appropriate for the court to pass on the question of value, rather than send it to the jury. Clearly, where no request is made by petitioner for such an instruction, and there is no objection in this regard to the charge given, the omission of an instruction on an uncontested and clearly established element cannot be considered to be plain error resulting in "a clear miscarriage of justice" or causing the "deprivation of a substantial right." *United States* v. *Urbana,* 412 F. 2d 1081, 1083 (C.A. 5), petition for certiorari pending, No. 199, this Term; see also *United States* v. *Bard,* 408 F. 2d 347, 348 (C.A. 6), certiorari denied, 396 U.S. 855; *United States* v. *Schmidt,* 376 F. 2d 751, 753 (C.A. 4), certiorari denied, 389 U.S. 884; *United States* v. *Salliey,* 360 F. 2d 699, 702–703 (C.A. 4).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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